857

FILED
OCT 10 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-908

In the

Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS,
Petitioner,

v.

SEATTLE SCHOOL DISTRICT NO. 1, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF AMICI CURIAE ALLIANCE FOR EDUCATION MUNICIPAL LEAGUE OF KING COUNTY MAYOR AND FORMER MAYORS OF SEATTLE AND FORMER SEATTLE SCHOOL BOARD MEMBERS IN SUPPORT OF RESPONDENTS

David J. Burman
Counsel of Record
Michael W. Hoge
J. Shan Mullin
PERKINS COIE LLP
1201 Third Avenue
Seattle, WA 98101-3099
(206) 359-8000
Attorneys for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

TABLE OF CONTENTS

INTEREST OF THE ALLIANCE FOR EDUCATION 1

INTEREST OF THE MUNICIPAL LEAGUE OF KING COUNTY 2

INTEREST OF MAYOR AND FORMER MAYORS OF SEATTLE 3

INTEREST OF FORMER SEATTLE SCHOOL BOARD MEMBERS 3

ARGUMENT 5

I. HISTORY OF EFFORTS TO REDUCE RACIAL ISOLATION IN SEATTLE PUBLIC SCHOOLS 6

- A. Testing of Alternatives 6
- B. Development of the Seattle Plan 7
- C. The Initiative 350 Litigation 8
- D. Federal Congressional and Executive Encouragement 11
- E. The State Constitutional Imperative 13
- F. Further Review and Narrowing 16

II. THE CONCLUSION BY THE SEATTLE PUBLIC SCHOOLS THAT REDUCTION OF RACIAL ISOLATION IS A COMPELLING INTEREST HAS STOOD THE TEST OF TIME 16

III. THE LOCAL OPTION TO CONSIDER RACE AS A FACTOR IN ASSIGNMENTS TO OVER-SUBSCRIBED SCHOOLS IS AN EXTREMELY NARROW EFFORT TO REDUCE RESEGREGATION 18

- A. The "Tie-Breaker" Could Not Be More Narrow 19

B. Reducing Resegregation Is a Narrow But Compelling Effort 20
C. Magnet Schools Have Been Tried 24
D. The Tie-Breaker Imposes Limited Burdens 25
E. The Tie-Breaker Is Not a Quota 25
F. The Local Democratic Process Results in Narrow Tailoring 26
CONCLUSION 27

TABLE OF AUTHORITIES

Cases

Board of Education of City School Dist. of City of New York v. Harris, 444 U.S. 130 (1979) 12

Board of Education of Oklahoma City Public Schools v. Dowell, 498 U.S. 237 (1991) 18

Board of Education, Island Trees Union Free School Dist. No. 26 v. Pico, 457 U.S. 853 (1982) 18

Brown v. State, 155 Wash. 2d 254, 119 P.3d 341 (2005) 15

Bustop, Inc. v. Board of Education, 439 U.S. 1380 (1978) 8

Citizens Against Mandatory Bussing v. Palmason, 80 Wash. 2d 445, 495 P.2d 657 (1972) 6

Columbus Board of Education v. Penick, 443 U.S. 449 (1979) 17

Dayton Board of Education v. Brinkman (I), 433 U.S. 406 (1977) 19

Dayton Board of Education v. Brinkman (II), 443 U.S. 526 (1979) 9

Delaware State Board of Education v. Evans, 446 U.S. 923 (1980) 19

Freeman v. Pitts, 503 U.S. 467 (1992) 18

Grutter v. Bollinger, 539 U.S. 306 (2003) 19

Locke v. Davey, 540 U.S. 712 (2004) 26

Milliken v. Bradley (I), 418 U.S. 717 (1974) 19

Milliken v. Bradley (II), 433 U.S. 267 (1977) 19

Missouri v. Jenkins, 515 U.S. 70 (1995) 18

Parents Involved in Community Schools v. Seattle School District No. 1, 149 Wash. 2d 660, 72 P.3d 151 (2003) 15

Randall v. Sorrell, __ U.S. __, 126 S. Ct. 2479, 165 L. Ed. 2d 482 (2006).....17

Regents of University of California v. Bakke, 438 U.S. 265 (1978).....19

Seattle School Dist. No. 1 v. State, 90 Wash. 2d 476, 585 P.2d 71 (1978) (*Education Funding I*).....13, 14

Seattle School Dist. No. 1 v. Washington, 473 F. Supp. 996 (W.D. Wash. 1979), *aff'd*, 633 F.2d 1338 (9th Cir. 1980), *aff'd*, 458 U.S. 457 (1982).....6, 7, 8, 9

Seattle School District, et al. v. State, Thurston County Superior Court No. 81-2-1713-1 (Sept. 7, 1983) (*Education Funding II*).....14, 15

State ex rel. Citizens Against Mandatory Bussing v. Brooks, 80 Wash. 2d 121, 492 P.2d 536 (1972).....6

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).....17, 18, 25

Walz v. Tax Commission of City of New York, 397 U.S. 664 (1979).....26

Washington v. Seattle School District No. 1, 458 U.S. 457 (1982).....passim

Wright v. Council of City of Emporia, 407 U.S. 451 (1972).....19

Statutes

Emergency School Aid Act, P.L. 93-318, §§ 701-720, 86 Stat. 354.....11, 12, 13

Other Authorities

A. Siqueland, *Without a Court Order—The Desegregation of Seattle's Schools* (1981).....6

Seattle Public Schools P105 Ethnic Count-October (1998- to current year), found at

http://www.seattleschools.org/area/siso/enroll/ enroll.xml 23

State of Washington Superintendent of Public Instruction Data and Reports, P-105 Reports, found at http://www.k12.wa.us/DataAdmin/default.aspx 23

Rules

Supreme Court Rule 37 2

In the

Supreme Court of the United States

No. 05-908

PARENTS INVOLVED IN COMMUNITY SCHOOLS,
Petitioner,

v.

SEATTLE SCHOOL DISTRICT NO. 1, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF AMICI CURIAE ALLIANCE FOR EDUCATION MUNICIPAL LEAGUE OF KING COUNTY MAYOR AND FORMER MAYORS OF SEATTLE AND FORMER SEATTLE SCHOOL BOARD MEMBERS

INTEREST OF THE ALLIANCE FOR EDUCATION

The Alliance for Education is a non-profit membership organization created by the Seattle business community to help ensure the academic success of all students in the Seattle School District. It is an independent voice and external catalyst for excellence in Seattle's schools. It is an affiliate of the Greater Seattle Chamber of Commerce, which played an important role in the District's decision to address racial

isolation in the public schools. The Alliance is guided by a broad-based coalition of business, civic, education, and philanthropic community leaders. The board of directors includes top executives of Seattle's major businesses as well as other community leaders. The Alliance has helped generate more than $95 million in charitable support for the Seattle Public Schools.

One of key strategic goals of the Alliance is to support the most highly-challenged schools and to close achievement gaps. The Alliance thus is vitally interested in local tools for improving achievement at all schools and avoiding racial isolation.

Moreover, because the Alliance is the key forum for business community input to the Seattle Public Schools, it emphasizes the needs of employers for graduates who contribute to and are comfortable in the pluralistic environment of those businesses. The business community is convinced that diversity has contributed to Seattle's dynamic business culture. Moreover, many Seattle businesses sell to, are supplied by, or otherwise regularly deal with businesses and people in other countries. Particularly in Seattle, racial isolation hampers preparation of students for effective civic and economic participation.[1]

INTEREST OF THE MUNICIPAL LEAGUE OF KING COUNTY

Since 1910, the Municipal League of King County has been the leading volunteer-based civic organization dedicated to effective and responsive government in the Seattle area. The League's mission is

> To promote good government that is open, effective and accountable in order to improve

---

[1] Pursuant to Rule 37, blanket letters of consent from the parties have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and nobody other than amici, their members, or their counsel contributed monetarily to the brief.

> the caliber of public officials and the quality of public decisions, and to assist our community to identify and efficiently solve its problems and reach its goals through active and broad-based participation of citizens in government.

In serving that mission, the League has recognized that encouraging diversity within the public educational system makes a vital contribution to preparing students for democratic citizenship. At a time when the District was being threatened with federal court litigation to compel a desegregation plan, the leadership of the Municipal League played an important role in ensuring local control of the efforts to reduce racial isolation in Seattle's schools. The League remains committed to that objective.

INTEREST OF MAYOR AND FORMER MAYORS OF SEATTLE

Wes Uhlman (1969-77), Charles Royer (1977-89), Norman Rice (1989-97), Paul Schell (1997-2001), and Greg Nickels (2001-present), all acting in their individual capacities, are former mayors and the current mayor of the City of Seattle. Each has supported the efforts of the Seattle School District to reduce racial imbalance in the schools through voluntarily-adopted, locally-controlled strategies. Each understands the compelling benefits of reducing racial imbalance in the public schools in Seattle; each has observed the practical and political pressures on the District to make the race-conscious efforts as narrow as possible; and each understands that there are no practical alternatives to race-conscious tools to address racial isolation.

INTEREST OF FORMER SEATTLE SCHOOL BOARD MEMBERS

Richard Alexander, Barbara Beuschlein, Cheryl Bleakney, Carver Gayton, Suzanne Hittman, Dorothy

Hollingsworth, Donald Olson, Michael Preston, Ellen Roe, Beverly Smith, Patt Sutton, T.J. Vassar, and David Wagoner were members of the elected Seattle School Board during the 1963-81 period in which (1) the Seattle School District considered, adopted, and implemented a variety of alternatives, including race-conscious school desegregation strategies such as the system-wide plan preserved in *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), and (2) the District initiated litigation under the Washington Constitution that affirmed the compelling role of desegregated schools in an adequate education for all children.

The former board members' interest is in confirmation that the legal framework in which their efforts occurred has been firmly and correctly established for decades. The outcome urged by Petitioner and the United States—that race may not be taken into account at all in voluntarily-adopted student assignment plans—would be inconsistent with a half century of judicial decisions, congressional statutes and appropriations, and executive administration and enforcement. During their tenures as board members, these amici relied upon those pronouncements to act in a manner consistent with their oaths of office to support and uphold the Constitutions of the United States and the State of Washington.

The former board members are interested also in vindication of the principle of local control of schools. There is no justification for federal judicial invalidation of decades of good-faith and often courageous actions by hundreds of elected school board members across the Nation to voluntarily address the educational harms caused by substantial racial imbalance, to provide students with the educational benefits of desegregated preparation for democratic citizenship and competitive participation in economic life, and to conform their school districts' operations to federal constitutional, statutory, and regulatory requirements.

ARGUMENT

Although one would not know it from the briefs of Petitioner and the United States, the history of the Seattle School District's efforts to reduce racial isolation in the schools did not begin, and end, with the challenged tie-breaker for high schools that are over capacity. This modest tool was an effort to preserve some of the reductions in racial isolation that had been accomplished, as these things must be, over many years.

This history is not "meaningless," Brief of Petitioner at 13, but instead is essential context for the present dispute. The history is set out below and leads to at least five conclusions:

- Reduction of racial isolation in public schools has been viewed for more than forty years as a compelling interest by Seattle's educators, school boards, business community, government leaders, and parents. Indeed, addressing racial isolation is required by the Washington Constitution's guarantee of a basic education for all children.
- Local school boards must have some ability to employ race-conscious tools to address racial isolation, and the Court, lower courts, Congress, and federal and state agencies have reviewed, funded, and ratified or encouraged race-conscious efforts by the District that were far broader than the modest tool being challenged here.
- The District has tried alternatives identified by Petitioner and the United States, has regularly reviewed its race-conscious efforts, has balanced them against other priorities, and has repeatedly narrowed and tried to end those efforts where that could be done without a return to racial isolation, and in some cases even when that would be the result.
- The tie-breaker is a very narrow tool to address the compelling interest in avoiding racial isolation,

which is worsening due to the termination of race-conscious efforts in Seattle.

- Petitioner and the United States are incorrect in stating—based on the simple fact that Seattle avoided comprehensive desegregation litigation through voluntary adoption of a system-wide desegregation plan—that the District had no federal constitutional duty to do anything. The most that can be said is that no court has imposed a federal desegregation duty on the District.

I. HISTORY OF EFFORTS TO REDUCE RACIAL ISOLATION IN SEATTLE PUBLIC SCHOOLS

A. Testing of Alternatives

During the 1960s and 1970s, minority residential areas in Seattle were growing, and racial isolation was increasing in many schools. In 1963, the District initiated and sought to motivate voluntary majority-to-minority transfers, but by 1971 it was clear that this alternative was not enough. The locally-elected school board decided to try a mandatory middle school assignment program as a back-up to voluntary efforts. *Seattle School Dist. No. 1 v. Washington*, 473 F. Supp. 996, 1002, 1006 (W.D. Wash. 1979), *aff'd*, 633 F.2d 1338 (9th Cir. 1980), *aff'd*, 458 U.S. 457 (1982). *See generally* A. Siqueland, *Without a Court Order—The Desegregation of Seattle's Schools* (1981).

The Board's decision to implement such a plan resulted in litigation and a recall attempt, which narrowly failed. 458 U.S. at 460 n.1. The litigation affirmed the authority of local Washington school boards to take these race-conscious actions. *State ex rel. Citizens Against Mandatory Bussing v. Brooks*, 80 Wash. 2d 121, 492 P.2d 536 (1972); *Citizens Against Mandatory Bussing v. Palmason*, 80 Wash. 2d 445, 495 P.2d 657 (1972). That authority, where there was political will to use it, was virtually unquestioned at the time. Indeed, locally addressing racial isolation, including through

race-conscious methods, was being strongly encouraged by all three federal branches of government.

Despite the District's early efforts, segregation continued to increase in the elementary and high schools, and in 1977 the District implemented a voluntary magnet program. Some students changed schools in response, but the overall effect was not desegregative. 473 F. Supp. at 1002; 458 U.S. at 461.

B. Development of the Seattle Plan

Earlier in 1977, the local ACLU, NAACP, and Church Council of Greater Seattle threatened suit, and the NAACP filed a complaint with the Office for Civil Rights (OCR) of the Department of Health, Education and Welfare (HEW), charging that the District was maintaining purposefully segregated schools. 473 F. Supp. at 1005-06. At that time, federal courts were applying the Court's decisions to subject a growing number of northern school districts to system-wide court-ordered busing plans. The District felt that, at a minimum, its federal funding was at risk. 458 U.S. at 460 n.3.

To avoid such litigation and to assure local school board rather than federal judicial control over the desegregation effort, Seattle's Mayor and the presidents of the local Chamber of Commerce, Municipal League, and Urban League urged the District to commit to elimination of racially-isolated schools. 473 F. Supp. at 1007; 458 U.S. at 460 n.2. The school board found that it had an educational, moral, and legal duty to do so, and committed to eliminate defined racial imbalance within two years.[2] 473 F. Supp. at 1007; 458 U.S. at 460 n.3. The board believed that desegregated education is the best preparation for democratic citizenship and for successful competition in the labor market. The Washington State Board of Education and the Washington State Human Rights Commission concurred in

---

[2] One board member, amicus Ellen Roe, thought the original plan went too far, but she had no doubt about the federal support for adopting it or its constitutional validity. She subsequently voted for narrower plans, including the challenged tie-breaker, before leaving the board.

the Board's definition of racial imbalance and the necessity for action. 473 F. Supp. at 1002.

After a thorough analysis of alternatives and plans by the board and a citizen's committee, including over thirty public hearings, the board in 1977 adopted a comprehensive plan. *Id.* at 1007. HEW's OCR accepted the District's commitment to eliminate racial imbalance as a settlement of the complaint filed by the NAACP. *Id.* at 1005. Adoption of the plan resulted in additional state court litigation that once again affirmed the board's legal authority to adopt the plan. *Id.* at 1005-06; 458 U.S. at 462.

Even the first "Seattle Plan" was sensitive to the need to minimize race-conscious efforts. The plan encouraged voluntary transfers, and neighborhoods (chosen based on race predominance) were paired to minimize assigning individual students by race. 473 F. Supp. at 1007; 458 U.S. at 461.

As the District was implementing the Seattle Plan, this Court was considering *Bustop, Inc. v. Board of Education*, 439 U.S. 1380 (1978). Justice Rehnquist denied a stay, stating that he had "very little doubt" that a state could address de facto racial isolation by busing 60,000 students for explicitly racial purposes, and that petitioners' claims (similar to Petitioner's claims here) were "indeed novel." *Id.* at 1383. Justice Powell agreed. *Id.* at 1384.

C. The Initiative 350 Litigation

In 1978 opponents of the Seattle Plan obtained passage of statewide Initiative 350 to halt the Plan's "forced busing." 473 F. Supp. at 1001 & 1008. The District challenged Initiative 350 in court, and some of the parties that had earlier threatened to sue the District intervened, accused the District of purposefully segregative actions, and asked the Court to order a remedy if the District, due to Initiative 350 or otherwise, refused to desegregate. The District Court bifurcated that claim for a Phase II if necessary. 458 U.S. at 464 n.8.

After a trial of Phase I, the District Court made "extensive and detailed findings of fact," *id.* at 464, and

found the Initiative unconstitutional. Among the Court's conclusions was that the Initiative "permits only court-ordered busing of students ... even though a school board may be under a constitutional duty to do so even in the absence of a court order." 473 F. Supp. at 1012. In affirming, the Court of Appeals noted that "the 'Seattle Plan' ... has been hailed as a model for other large cities." 633 F.2d at 1341.

The State appealed. In its argument to this Court the District challenged the Initiative as violating the "affirmative constitutional duty" of a school district "'to eradicate the effects' of past unlawful segregation." Brief of Appellees, *Washington v. Seattle School District No. 1*, No. 81-9, at 35 (quoting *Dayton Board of Education v. Brinkman (II)*, 443 U.S. 526, 537 (1979)). The District represented in its brief that the school board

> was well aware that there was some likelihood a court could find unlawful segregation in Seattle. J.A. 12-13, 16-17, 74, & 127. Although unable and unwilling to examine the motives of its predecessors, the Board was not unreasonable in its perceptions. Faculty assignment practices, for instance, had been similar to those which numerous court decisions have deemed to further schools' racial identifiability. Pl. Ex. 69. Other historical factors, such as drawing of attendance boundaries and student transfer policies, in some instances bore at least surface similarity to the facts reported in *Columbus Board of Education v. Penick*, 443 U.S. 449 (1979); *Dayton Board of Education v. Brinkman (II)*, 443 U.S. 526 (1979); *Keyes v. School District No. 1*, 413 U.S. 189 (1973); and similar decisions.

Id. at 4 n.7. The District's opponent in that case, the State of Washington, did not disagree that the school board had recognized a legal duty to desegregate. Brief of Appellant at 41. The contrary and conclusory assertions of Petitioner,

Brief at 12 & 34, and the United States, Brief at 6, 8, & 15, in this case are baseless.

The Court affirmed the two lower courts and preserved the Seattle Plan against arguments by the State and United States. The United States—which switched sides from its position in the lower courts, argued that Initiative 350 was not a racial classification, and maintained that the District had no constitutional duty to act—did not think to question whether the District's race-conscious plan was itself constitutionally flawed and thus unable to claim the protection of the Equal Protection Clause against a state law seeking to undo it.

The Court recognized "that white as well as Negro children benefit from exposure to 'ethnic and racial diversity in the classroom'" and held:

> Education has come to be "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). When that environment is largely shaped by members of different racial and cultural groups, minority children can achieve their full measure of success only if they learn to function in—and are fully accepted by—the larger community. Attending an ethnically diverse school may help accomplish this goal by preparing minority children "for citizenship in our pluralistic society," *Estes v. Metropolitan Branches of Dallas NAACP*, 444 U.S. 437, 451 (1980) (POWELL, J., dissenting), while, we may hope, teaching members of the racial majority "to live in harmony and mutual respect" with children of minority heritage. *Columbus Board of Education v. Penick*, 443 U.S., at 485, n. 5 (POWELL, J., dissenting).

458 U.S. at 472-73.

In the acknowledged context of a race-conscious plan, the Court told the Seattle School District that, even "in the absence of a constitutional violation, the desirability and efficacy of school desegregation are matters to be resolved through the political process." *Id.* at 475.

D. Federal Congressional and Executive Encouragement

During this time Congress was encouraging and funding race-conscious student assignment strategies (and not just in school districts that had been adjudicated to have a constitutional obligation to take such actions). Regulations and enforcement actions of HEW's OCR carried out the congressional will.

For example, as Seattle struggled with increasing racial isolation prior to adoption of its system-wide plan in 1978, Congress in 1972 enacted the Emergency School Aid Act ("ESAA"), P.L. 93-318, §§ 701-720, 86 Stat. 354. The ESAA's purposes included providing financial assistance "to encourage the voluntary elimination, reduction, or prevention of minority group isolation in elementary and secondary schools with substantial proportions of minority group students," and "to aid school children in overcoming the educational disadvantages of minority group isolation." *Id.* § 702(b)(2) & (3).

A district eligible for such financial assistance included one "which, without having been required to do so, has adopted and is implementing, or will, if assistance is made available to it under this title, adopt and implement, a plan for the complete elimination of minority group isolation in all the minority group isolated schools of such agency" or otherwise implement a plan to reduce or prevent racial isolation. *Id.* § 706(a)(1)(B) & (C). Funding applications could be approved only if the district provided assurances that it would carry out and comply with all terms of the plan making it eligible. *Id.* § 710(a)(9).

Among the criteria to be employed by the Secretary of HEW in making eligibility determinations were the degree to

which the district's plan was likely to decrease and prevent minority isolation, the extent to which the plan constituted a comprehensive districtwide approach to elimination of minority group isolation to the maximum extent practicable, and the degree to which the plan promised achievement of the ESAA's purposes referenced above. *Id.* § 710(c)(2), (3), & (4). HEW was specifically directed to give no less favorable consideration to districts voluntarily undertaking such commitments than to districts legally required to do so. *Id.* § 710(d)(1).

This regime, as is obvious from the face of the statutory provisions, required wholesale use of explicitly race-conscious student assignment strategies by school districts nationwide. The ESAA remained in place for several years, but the constitutional validity of Congress' action in adopting it, and of the actions of the Executive in administering and enforcing it, were never seriously questioned. In deciding that segregated faculties caused ineligibility for ESAA funds regardless of whether the segregation was intentional, the Court observed in *Board of Education of City School Dist. of City of New York v. Harris*, 444 U.S. 130 (1979):

> A reading of the Act in its entirety indisputably demonstrates that Congress was disturbed about minority segregation and isolation as such, de facto as well as de jure, and that, with respect to the former, it intended the limited funds it made available to serve as an enticement device to encourage voluntary elimination of that kind of segregation.
>
> . . . .
>
> There can be no disagreement about the underlying philosophy of the Act. At the time of ESAA's passage, it was generally believed that the courts, when implementing the Constitution, could not reach de facto segregation. *See, e. g.*, 117 Cong. Rec. 11519 (1971) (remarks of Sen. Mondale). Congress, apparently, was not then in much of a mood to

> mandate a change in the status quo. The midground solution found and adopted was the enticement approach "to encourage the voluntary elimination, reduction, or prevention of minority group isolation," as § 702(a)(2) of the Act recites. Thus, it would make no sense to allow a grant to a school district that, although not violating the Constitution, was maintaining a de facto segregated system. To treat as ineligible only an applicant with a past or a conscious present intent to perpetuate racial isolation would defeat the stated objective of ending de facto as well as de jure segregation.

Id. at 141-42. *See also* Brief of United States at 25-26 (findings by Congress and Department of Education).

There was no serious suggestion during the 1970s, 1980s, and 1990s that voluntary race-conscious student assignment strategies were somehow unconstitutional; federal desegregation-related funding during the entire time was similar to the ESAA's approach. If, as urged by Petitioner and the United States, the plan at issue now is unconstitutional because race-conscious assignments may be imposed only by a court as a remedial measure, then the Judiciary, the Congress, and the President were as guilty of violating their oaths of office during this period as were the former school board member amici.

E. The State Constitutional Imperative

During the time the District was considering and adopting the Seattle Plan, it was also litigating a claim for additional school funding against the State of Washington. That effort culminated in *Seattle School Dist. No. 1 v. State*, 90 Wash. 2d 476, 585 P.2d 71 (1978) (*Education Funding I*). In *Education Funding I*, the Washington Supreme Court examined the scope of the education guaranteed to all children by Article 9 of the Washington Constitution. *Id.* at 514-18, 585 P.2d at 93-95. The Court found that to meet "the demands of modern society," *id.* at 516-17, 585 P.2d at 94,

the State's constitutional duty to make "ample provision for the education of all children"

> goes beyond mere reading, writing and arithmetic. It also embraces broad educational opportunities needed in the contemporary setting to equip our children for their role as citizens and as potential competitors in today's market as well as in the marketplace of ideas. Education plays a critical role in free society. It must prepare our children to participate intelligently and effectively in our open political system to ensure that system's survival. It must prepare them to exercise their First Amendment freedoms both as sources and receivers of information; and, it must prepare them to be able to inquire, to study, to evaluate and to gain maturity and understanding. The constitutional right to have the State "make ample provision for the education of all [resident] children" would be hollow indeed if the possessor of the right could not compete adequately in our open political system, in the labor market, or in the marketplace of ideas.

Id. at 517-18, 585 P.2d at 94-95 (internal citations omitted).

In follow-on litigation brought by the District in 1981, *Education Funding II*, the trial court, Judge Robert J. Doran, applied the "broad guidelines" of *Education Funding I* to the extra transportation costs of the District's race-conscious efforts to reduce racial isolation. Among the Court's findings of fact:

> 17.1 A racially segregated education is inadequate to equip students, especially minority students, with basic educational skills and with the ability to participate effectively in our open political system and in the labor market.
>
> 17.2 Compared to their counterparts from segregated schools, minority students from

> desegregated schools experience significant gains in basic skills achievement, advance further through school, more frequently obtain college degrees, have significantly higher employment rates and income, and participate more actively and effectively in the political process.
>
> 17.3 Desegregation significantly improves racial attitudes and behavior of both minority and majority students.

Seattle School District, et al. v. State, Thurston County Superior Court No. 81-2-1713-1 (Sept. 7, 1983) (*Education Funding II*). The State chose not to appeal the resulting judgment, and the trial court's decision has been accepted as persuasive, though not preclusive. In describing an argument in *Brown v. State*, 155 Wash. 2d 254, 262, 119 P.3d 341, 345 (2005), the Washington Supreme Court said that it was "based on a well reasoned, but never appealed, 1983 decision of Superior Court Judge Robert J. Doran."[3]

---

[3] In its opinion deciding the question certified by the Ninth Circuit in this case, the Washington Supreme Court said:

> Admittedly, we have never explicitly held that the state constitution requires racial integration. We have, however, been unwavering in holding that article IX imposes upon the State the paramount duty to provide an ample, general, and uniform basic education to all children. Therefore, if it is determined that in a contemporary setting de facto segregated schools cannot provide children with the educational opportunities necessary to equip them for their role as citizens, then the state constitution would most certainly mandate integrated schools.

Parents Involved in Community Schools v. Seattle School District No. 1, 149 Wash. 2d 660, 682, 72 P.3d 151,162-63 (2003).

F. Further Review and Narrowing

The original Seattle Plan was in place for a decade. It successfully reduced racial isolation but continued to spur complaints. The political process that the Court had identified in the *Initiative 350* case continued to test the "desirability and efficacy" of the Seattle Plan. School board members were sensitive to that opposition in their own elections and in the frequent bond and levy elections required under state law for local districts to raise funds to supplement those provided by the State. Eventually, the District entered another round of studies, hearings, and consideration of alternatives. For the 1988-89 school year, it implemented a "controlled choice" plan. That plan enhanced the role of parental choice in school assignments and reduced the number of students subject to mandatory busing. Entire neighborhoods were no longer moved. Families ranked their choices and were more likely to get choices that reduced racial isolation.

That plan stayed in place until the 1998 school year, when mandatory assignments for desegregation purposes were terminated. The only remaining race-conscious assignment strategy was the high school entry tie-breaker. In 2000, as Petitioner admits, Brief at 10, the District re-reviewed its efforts and narrowed them even further.

II. THE CONCLUSION BY THE SEATTLE PUBLIC SCHOOLS THAT REDUCTION OF RACIAL ISOLATION IS A COMPELLING INTEREST HAS STOOD THE TEST OF TIME

Thus, for many decades the Seattle School Board has considered reduction of substantial racial isolation in public education a compelling interest. Seattle School Board members, like school board members across the Nation, have relied on the numerous federal and state court decisions recognizing the key role that desegregated public education plays in preparing students for democratic citizenship and

effective competition in the labor market,[4] the Court's unanimous dictum in *Swann*,[5] congressional legislation and funding in support of race-conscious student assignment strategies, and the Executive's regulations and enforcement actions toward the same end.

For over 30 years, there has been a strong and consistent appreciation by the District and this Court that reduction of racial imbalance is a sufficiently important justification, in the context of K-12 public education, to permit the consideration of race in student assignments.[6] In light of

---

[4] "It is essential that the diverse peoples of our country learn to live in harmony and mutual respect. This end is furthered when young people attend schools with diverse student bodies." *Columbus Board of Education v. Penick*, 443 U.S. 449, 485 n.5 (1979) (Powell, J., dissenting).

[5] *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971):

> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court.

[6] *Randall v. Sorrell*, __ U.S. __, 126 S. Ct. 2479, 2489-90, 165 L. Ed. 2d 482 (2006)(plurality opinion):

> *Stare decisis* . . . avoids the instability and unfairness that accompany disruption of settled legal expectations. For this reason, the rule of law demands that adhering to our prior case law be the norm. Departure from precedent is exceptional, and requires "special justification." *Arizona v. Rumsey*, 467 U.S. 203, 212, 104 S. Ct. 2305, 81 L. Ed. 2d 164

those educational benefits for all students, it is an insult not just to the District and the former board members, but to the Court, for Petitioner and the United States to sneer that the District has engaged in "discrimination for its own sake," Brief of Petitioner at 26, or "trivial changes in pigmentation diversity," *id.* at 22 & 36; *see* Brief of United States at 15 & 22.

Neither Petitioner nor the United States has made a candid effort to demonstrate "that circumstances have changed so radically as to undermine" the "critical factual assumptions" in *Swann*, *Initiative 350*, and similar cases. They instead ignore or rewrite what the Court did and upon which the former school board members, and the overall Seattle community, relied.

III. THE LOCAL OPTION TO CONSIDER RACE AS A FACTOR IN ASSIGNMENTS TO OVER-SUBSCRIBED SCHOOLS IS AN EXTREMELY NARROW EFFORT TO REDUCE RESEGREGATION

As shown in the history above, the constraints of practicality and democracy have been sufficient, by themselves, to assure that non-invidious use of race will be appropriately "fit" to its compelling objective. Here, the narrow-tailoring requirement has been satisfied through the democratic process as part of the vital national tradition of local control of schools.[7]

(1984). This is especially true where, as here, the principle has become settled through iteration and reiteration over a long period of time.

[7] *See Missouri v. Jenkins*, 515 U.S. 70, 99 (1995); *Freeman v. Pitts*, 503 U.S. 467, 490 (1992); *Board of Education of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237, 248 (1991); *Board of Education, Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853, 863-64 (1982); *id.* at 891-92 (Burger, C.J. joined by Powell, Rehnquist, and O'Connor, JJ., dissenting) ("A school board is not a giant bureaucracy far

A. The "Tie-Breaker" Could Not Be More Narrow

With no sense of irony, Petitioner and the United States criticize the District for not dealing with racial isolation in all of its high schools. This superficial approach to underinclusiveness hardly disproves narrow tailoring, much less indicates some sort of invidious discrimination against a small subset of white students and families. There is no suggestion of a better fit with some illegitimate objective. The natural, and correct, explanation for this underinclusiveness is that other priorities and practical limitations, primarily ones like choice and proximity that Petitioner says are important, have caused more narrowing than the Constitution requires. This type of underinclusiveness in fact proves that race was not raised above all other considerations, but instead was part of a "holistic" balancing that is exactly what is called for in *Grutter v. Bollinger*, 539 U.S. 306 (2003) and *Regents of University of California v. Bakke*, 438 U.S. 265 (1978).

That the United States posits an all-or-nothing approach to racial isolation, and challenges a technique as narrow as the tie-breaker, indicates a desire to make the narrow tailoring test fatal in fact in all cases, and to signal that educational leaders should not even try to address the compelling interest in reducing racial isolation because no effort will pass muster. Indeed, the United States attempts to redefine the compelling interest to incorporate a self-defeating limitation on acceptable methods. Brief at 17 & 27.

What could be more narrow than the tie-breaker?

---

removed from accountability for its actions; it is truly 'of the people and by the people.' A school board reflects its constituency in a very real sense"); *Delaware State Board of Education v. Evans*, 446 U.S. 923, 926 (1980) (Rehnquist, J., joined by Stewart and Powell, JJ., dissenting from denial of certiorari); *Dayton Board of Education v. Brinkman (I)*, 433 U.S. 406, 410 (1977); *Milliken v. Bradley (II)*, 433 U.S. 267, 296 (1977) (Powell, J., concurring); *Milliken v. Bradley (I)*, 418 U.S. 717, 741-742 (1974); *Wright v. Council of City of Emporia*, 407 U.S. 451, 478 (1972) (Burger, C.J., joined by Blackmun, Powell and Rehnquist, JJ., dissenting).

- It does not deny any student the District's program of education. There is no "loser out."
- It is applied at only one of thirteen grade levels.
- It is not applied even to all high schools, but only to those that are over-subscribed and thus where some students are not going to get their first choice in any event.
- It does not set a target range for every minority group.
- The goal of the race-conscious tool is "one factor among many" in assignments. Brief of Petitioner at 28. It is not raised above all other educational and practical concerns but is part of a holistic approach to determining who goes to which high schools. Choice, capacity, program placement, proximity, and sibling attendance all are critical.
- There is no intrusive exploration of the student's race; families are trusted to be honest in their identification.
- Only a few hundred students are arguably negatively affected, and those students usually get their second or third choice. If families are unhappy with that choice after a year, there will often be space is the desired school due to transfers or drop-outs at that level, and there is no race-conscious limitation on their choice of alternatives. Only a handful of the affected students chose to join Petitioner's effort or leave the District. Brief of Petitioner at 9.

B. Reducing Resegregation Is a Narrow But Compelling Effort

Petitioner and the United States are correct that the tie-breaker does not have a dramatic direct effect, but both logic and history show that, absent this litigation, it might have been enough to keep at least some high schools from tipping back to racial isolation.

As the District brought to an end years of broader efforts to reduce racial isolation caused by past identification of some schools as white or minority and by housing patterns, the tie-breaker was developed to at least slow resegregation of some high schools where that could be accomplished without too much disruption and unpopularity.

Perceptions of the current and likely future status of schools as racially isolated affect high school and residence choices by families and teachers. Those perceptions and choices interact to contribute to racial isolation and racial identification.

As do amici, many students and parents see the value of education in a racially diverse environment. The Seattle Public Schools wants to offer that attribute where reasonably possible. Indeed, many private schools in Seattle want to offer diversity, and they recruit and grant tuition waivers to public school students who would contribute to that end.

But students and parents who value a diverse educational environment will not give that factor much weight in high school or residence choice if the school's diversity is likely to ebb and even be replaced by racial isolation. The reality is that the risk that racial isolation will develop causes many students and families to opt for schools in which the student's race is predominant, exacerbating the problem. Similarly, many students and parents who see proximity benefits or other educational values in a particular school will nonetheless not choose that school if it is racially isolated or seems likely to evolve in that direction, precluding a purely voluntary approach.

Thus, there is an inevitable, self-perpetuating cycle if the District does nothing. In the longer run, that cycle is made even worse by two other sets of perceptions and decisions. Better teachers, with more choices than poorer teachers, are more likely to opt out of schools headed toward racial isolation. Families are much less likely to consider moving to a home in proximity to a school in which their children would be racially isolated, thus reversing the slow progress in making Seattle housing patterns less segregated that occurred when racial isolation was being addressed. *See* Brief of

Petitioner at 15 n.9. And a worsening of housing patterns makes racial isolation even more common and harder to address in the future.

This vicious cycle might start slowly, but once perceptions become widespread, the change will be rapid. And if the District erred by doing too little to stop or slow the cycle (as many fear it did with elementary and middle schools), undoing the resulting racial isolation later will require more burdensome race-conscious actions than are required simply to avoid losing all the gains from past efforts. That is, overly-narrow tailoring will backfire. Trusting local school board judgments, and allowing a slow process of backing away from race-conscious assignments, is true in the long run to the principles that Petitioner and the United States espouse.

The logic of the tie-breaker thus was to reassure and encourage many students to choose high schools where they would be in the minority, but not an isolated minority, and, if necessary, to require a small number of them to attend other schools if their first choice were over-subscribed. Family choice was given the highest priority, so the tie-breaker was applied only to over-subscribed schools where choice necessarily had to be sacrificed in some fashion. The convenience to families of having siblings at the same school was also given priority over racial isolation and proximity concerns.

Contrary to the unproven assumption by Petitioner, Brief at 16 & 37, and the United States, Brief at 3,[8] the tie-breaker had some positive effects, albeit indirect, on schools that were undersubscribed. Students and parents looked beyond their first or obvious choice. Because the majority of the oversubscribed schools were historically white schools in historically white neighborhoods, the tie-breaker created a

---

[8] Petitioner and the United States ignore the procedural posture of the case. Judge Rothstein, now Director of the Federal Judicial Center, ruled against Petitioner on summary judgment, but Petitioner and the United States improperly treat Petitioner's factual inferences and arguments as if they were undisputed or at least established at trial.

small amount of room for minority students at those schools and encouraged white students to consider undersubscribed schools in minority neighborhoods.

Recent history shows that the tie-breaker was not overly-broad, much less unnecessary. Many elementary and middle schools have become racially isolated and identifiable since race-conscious student assignment efforts ended at those levels.[9] As of October 2005, in a district that is 41% white, two of ten middle schools have 6% or less white students. Eighteen of sixty elementary schools are under 10%, with nine being 4% or under.

As to high schools, Petitioner and the United States misleadingly discuss only the immediate aftermath of ending the tie-breaker, when schools, especially in upper grades, still reflected the earlier, more aggressive efforts to reduce racial imbalance. *See* Brief of Petitioner at 12 & 14. Or they rely on dated projections that have been belied by the real world facts. *See id.* at 39; Brief of United States at 3 & 14.

Thus, even in the short time since the tie-breaker was ended, the percentage of white students at Franklin High School, one of the oversubscribed schools, has been cut in half, to ten percent. Even at undersubscribed Cleveland, the percentage of white students has already dropped by a sixth, to under eight percent, and at undersubscribed Chief Sealth by a quarter, to twenty-five percent. At Garfield, an exceptional and oversubscribed school that attracted many whites to a historically minority school, the number of whites has declined rather steadily since the tie-breaker ended. And of course the white majority at schools like Ballard, Roosevelt, and Ingraham is growing substantially larger.[10]

Although the most dramatic tipping effect has occurred only in Franklin to date, there is little reason to hope that the

---

[9] Seattle Public Schools P105 Ethnic Count-October (1998- to current year), found at http://www.seattleschools.org/area/siso/enroll/enroll.xml; State of Washington Superintendent of Public Instruction Data and Reports, P-105 Reports, found at http://www.k12.wa.us/DataAdmin/default.aspx.

[10] *Id.*

negative trends will reverse rather than become decidedly worse in the years ahead, as they already have at the elementary and middle school levels. Regrettably, Petitioner is simply wrong to claim "significant percentages" of white students in every high school. Brief at 12-13.

C. Magnet Schools Have Been Tried

Petitioner and the United States suggest that the District should have employed magnet schools as an alternative, but of course they do not explain how such schools would work any better now than when the District tried them in the past. The Court has already found that the District tried magnet programs first, and determined that "mandatory reassignment of students was necessary if racial isolation in its schools was to be eliminated." 458 U.S. at 461; *see id.* at 473 n.16 ("a voluntary program would not serve to integrate the community's schools").

One possible magnet approach would be to place a narrow program that is particularly attractive to white students in a historically minority school so as to create an enclave that would create good overall statistics for that school without doing much to further the District's educational purposes for addressing racial isolation. It is race-conscious in the choice of both the program and the receiving school. Its success depends on forcing or persuading minority students to leave the enhanced school to make room for whites.

A second option would be to discriminate in "resource allocation, personnel, and curriculum" (Brief of United States at 23) in favor of historically minority schools, at the expense of historically majority schools, and to do so to such an obvious and announced extent that white students would opt for historically minority schools. This is a cynical, Some Children Deliberately Left Behind option. It is not surprising that the District, with a "strong interest in providing a high quality education to all students," *id.* at 25, and a state and now a federal obligation to educate all children, has rejected it. It, too, requires race-conscious consideration of which schools to invest in and which to short-change.

D. The Tie-Breaker Imposes Limited Burdens

Any burden on third parties here is race-neutral. The plan reduces the harm of racial isolation by ensuring equal access among minority and majority students to the most sought-after high schools, notwithstanding the unfair access certain groups would have to popular high schools if distance is the determinant. The plan reassures and provides greater opportunities for parents who want a racially desegregated education for their students. It is not unconstitutional for government to be on the side of people who want integrated schools.

E. The Tie-Breaker Is Not a Quota

The Court should reject the notion, urged by Petitioner and the United States (both in this case, where the plan is modest in technique and directly affects only five of approximately 100 schools, and in Louisville, where the plan is more comprehensive) that consideration of race in addressing racial isolation *ipso facto* amounts to an unconstitutional "quota." Quotas might be too extreme in the non-remedial context, but that does not mean that all race-conscious actions in all circumstances are quotas. To address racial isolation, it is inherently necessary to increase the number of either white or minority students. Any technique with the purpose and effect of doing that must be race-conscious, as Petitioner admits, Brief at 22 & 25, but that does not make it a quota. The very term is used to distinguish impermissible from permissible uses of race.

The Court's unanimous dictum in *Swann* that school boards can, for educational reasons, require a precise racial ratio in all schools approves practices much closer to quotas than the standard and techniques employed in Seattle to avoid greater imbalance at a few high schools. Equal Protection jurisprudence has always recognized that, in appropriate contexts, the appropriately-limited consideration of race is constitutional. The courts, Congress, the Executive, and local school boards have all understood for decades that reducing and avoiding racial imbalance in K-12 public education is a local, state, and national interest of the highest order. This

broadly-shared understanding is inherent in the entire legal history of the period.

F. The Local Democratic Process Results in Narrow Tailoring

There should be "play in the joints," *cf. Walz v. Tax Commission of City of New York*, 397 U.S. 664, 669 (1979); *Locke v. Davey*, 540 U.S. 712, 718-19 (2004), between the Equal Protection cases placing an affirmative duty on school boards to overcome the effects of past purposeful segregation and the cases forbidding the invidious use of race for its own sake, or as a quota, in pursuit of a noncompelling interest.

This is an area in which deference to the democratic political process, and to local control, is appropriate for sensible, practical reasons. The United States should be supporting rather than denigrating elected public officials' sincere attempts to address the overall educational needs of their communities. Even putting aside Petitioner's failure of *proof*, who thinks that, in the real world, a democratically elected school board, dependent on the elected state legislature, regular local levy and bond elections, and charitable contributions for necessary school funding, is going to employ unpopular race-conscious tools more broadly than absolutely necessary?

Seattle's history has included opposition to and litigation against nearly every approach the District has employed, even as the goals have become progressively less ambitious and the means steadily less robust. This is democratic narrow tailoring at work, yet the District's reward is the disingenuous suggestion that scaling back the goal and the means of achieving it shows that the goal is not compelling. Of course, neither Petitioner nor the United States would support, as both compelling and narrow, a more rigorous requirement, addressing all major racial groups separately, and enforced in all schools through mandatory busing.

Where the context, as here, presents no danger of a political racial spoils system—unlike the "stacked-deck" program cases discussed in Brief of Petitioner at 27—the

Court should defer to the vital national tradition of local control of schools. The practical limits of democracy assure against school boards' using race excessively in school assignments to prevent or ameliorate racial isolation.

CONCLUSION

The Court should uphold the rule of law and affirm the judgment of the Court of Appeals.

RESPECTFULLY SUBMITTED this 6th day of October, 2006.

Perkins Coie LLP
David J. Burman
Michael W. Hoge
J. Shan Mullin
Attorneys for Amici Curiae